

*NO COPY OF THIS TRANSCRIPT MAY BE MADE PRIOR TO JANUARY 2, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * *

OLIVIA KARPINSKI, PAUL EDALAT,

Plaintiffs,

v.

UNION LEADER CORPORATION,
PATRICIA J. GROSSMITH, TRENT E.
SPINER,

Defendants.

* * * * *

*
*
*
*
*
*
*
*
*
*
*
*
*
*
*

1:18-cv-1214-PB
April 23, 2019
2:12 p.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Plaintiff:

Joshua M. Wyatt, Esq.
City of Dover

Matthew R. Johnson, Esq.
Devine Millimet & Branch PA

For the Defendant:

Gregory V. Sullivan, Esq.
Malloy & Sullivan Lawyers PC

Court Reporter:

Liza W. Dubois, RMR, CRR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, New Hampshire 03301
(603) 225-1442

1 P R O C E E D I N G S

2 THE CLERK: This court is in session and has
3 for consideration a motion hearing in civil matter
4 18-cv-1214-PB, Karpinski, et al vs. Union Leader
5 Corporation, et al.

6 THE COURT: Okay. Let's start with the
7 defendants' motion to dismiss and, in particular, if the
8 defendant would focus on the fair report privilege and
9 how it affects the plaintiffs' claims for defamation and
10 false light.

11 So why don't you start with that. Okay?

12 MR. SULLIVAN: Thank you. Good afternoon,
13 your Honor. Gregory Sullivan representing Union Leader
14 Corporation, Patricia Grossmith, and Trent Spiner.

15 Your Honor, it's the position of my clients
16 that the complained-of article was a fair and accurate
17 report of judicial proceedings, well-publicized judicial
18 proceedings, then pending in the state of California.

19 My client was admittedly contacted by a public
20 relations firm headquartered, I believe, in Boston and
21 as a result, perused the information that was provided
22 to my client. And I'd point out that one of those
23 materials that were provided to my client was the
24 deposition transcript of the plaintiff Olivia Karpinski.

25 Upon reading that deposition, the author of

1 the article, Grossmith, formed the opinion that Olivia
2 Karpinski had, indeed, according to that court record,
3 admitted that the allegations were baseless.

4 And much has been said in the pleadings before
5 the Court about the applicability or the inapplicability
6 or the privilege and the adoption of Restatement of
7 Torts (Second) --

8 THE COURT: I think that they have -- their
9 arguments can be grouped into three categories. The
10 first category is that the -- that the requirement that
11 there be judicial action has not been satisfied here;
12 the second argument is that they sufficiently allege
13 malice to prevent the privilege from applying or to
14 prevent dismissal of the complaint on that basis; and
15 the third is that construing their complaint and the
16 materials in the light most favorable to them, the --
17 they have identified four statements that are not a fair
18 and accurate report that's required for the fair report
19 privilege to apply.

20 Do you -- let me ask plaintiffs. Do you agree
21 that your arguments with respect to fair report
22 privilege can be fit into those three broad categories?

23 MR. WYATT: Well, your Honor, I would maybe
24 add another category, maybe perhaps more. Let me think
25 about this.

1 On this record, there's no evidence that there
2 was any reliance on the filings in the Cahill action.
3 So before you even ask the question of was there
4 judicial action, in our view, the -- there's nothing on
5 this record that supports the proposition that that was
6 relied upon for the reporting.

7 THE COURT: All right. I -- I don't find any
8 requirement in the case law that in order to claim the
9 privilege they have to prove that they read the
10 pleadings and relied on them. They could have heard
11 about the pleadings from a second- or thirdhand source.
12 If they report what the pleadings contained fairly and
13 accurately, I'm not aware of any exception to the fair
14 report privilege.

15 What case do you rely on for that kind of
16 fourth exception?

17 MR. WYATT: Your Honor, there is the *Jankovic*
18 case cited in our objection and then there's two cases
19 cited in --

20 THE COURT: Do you have copies of those cases?

21 MR. WYATT: I do, your Honor.

22 THE COURT: All right. Pull them out and give
23 them to my clerk. She's going to come over and get them
24 from you and then I'm going to read them because I
25 didn't see that support for that proposition in your

1 materials.

2 MR. WYATT: Bear with me, your Honor.

3 THE COURT: If you can't find them, just give
4 me the cite. I'll have my law clerk go up and print
5 them out for me.

6 MR. WYATT: I have two of them, your Honor.
7 Bear with me. I'm --

8 THE COURT: Hand up the two that you have.
9 I'll read those while you're looking for the third.

10 MR. WYATT: What I'm handing you -- I believe
11 I just found it.

12 THE COURT: Okay. So I'm reading *Suulutaaq*
13 and *Williams* -- *Suulutaaq v. Williams* and *Jankovic vs.*
14 *International Crisis Group*, which the defendant --
15 excuse me -- the plaintiff says -- and also *Bufalino*,
16 which are cases that the plaintiff says are cited in
17 their materials.

18 So I'm just going to read those over.

19 MR. WYATT: Your Honor, if I may, there's one
20 more. And I apologize. I've marked on this case --

21 THE COURT: All right. Hand it up. Hand it
22 up.

23 MR. WYATT: It's the *Thomas* case. It's a
24 New Hampshire Supreme Court case.

25 THE COURT: I've read *Thomas* many times. I

1 don't find any support in *Thomas* for the proposition
2 you're citing, but I'll have you point me to it in a
3 minute. So let me read these other cases.

4 Okay. So I've read *Jankovic*. I don't
5 understand how that supports the point you're making at
6 all. So how does it support the point that the fair
7 report privilege is not available to somebody unless
8 they actually read the records that they're describing?

9 MR. WYATT: Your Honor, that case, I will --
10 would admit is probably the least supportive, but it
11 does talk about the proposition that it -- it must be
12 attributed to the official action of record that you're
13 citing --

14 THE COURT: Yeah. That -- and that's done in
15 this case. Well, let me even ask a preliminary
16 question.

17 So we're all in agreement there are four
18 statements on which your claim's based --

19 MR. WYATT: That's right.

20 THE COURT: -- right? So we look at each of
21 those four statements and each of them is attributed to
22 the pleadings.

23 MR. WYATT: Well, your Honor, it doesn't
24 reference where they're drawn. One of them, I don't
25 believe --

1 THE COURT: Right. There's a difference
2 between what they are attributed to and where they are
3 getting their information from. You seem to have a view
4 that the law requires them to actually read the record
5 themselves in order to report on it. I'm saying
6 *Jankovic* does not support that proposition. They --
7 each of the four statements is attributed to the art --
8 to the pleadings, so that requirement is satisfied. And
9 so we -- to the extent you say there's some additional
10 requirement that's not in New Hampshire law or in the
11 Restatement of Torts that they -- if they don't read it
12 themselves, they can't claim the privilege, we need to
13 examine that proposition. But *Jankovic* doesn't support
14 that proposition.

15 Let me go on to read *Bufalino*.

16 All right. So *Bufalino* is a Second Circuit
17 opinion from 1982. I agree with you that it explores
18 the question of reliance under Pennsylvania law. It
19 does note, however, that the -- the Pennsylvania law
20 that the -- that the district judge relied on for the
21 proposition that: How a reporter gathers his
22 information concerning a judicial proceeding is
23 immaterial provided his story is a fair and
24 substantially accurate portrayal of the events in
25 question.

1 Take -- that's citing to the Pennsylvania
2 Supreme Court.

3 And then the Second Circuit says -- it limits
4 the extent of that to say that the privilege is
5 available only where a reporter who purports to report
6 on an official proceeding does not have personal
7 knowledge of the proceeding but instead relies on an
8 intermediary who does.

9 So you would agree with me that *Bufalino*, even
10 if it were the -- stated the law of New Hampshire
11 correctly, would recognize that the privilege was
12 available either if the reporter has knowledge of the
13 records or he relies on someone who does. Because
14 that's what the Second Circuit construes the
15 New Hampshire -- the Pennsylvania Supreme Court
16 precedent to hold.

17 MR. WYATT: I would agree that if the reporter
18 is aware of and relying on the actual court records they
19 are currently citing --

20 THE COURT: Yeah. So, for example, if someone
21 says to the reporter, I have read the court records, now
22 let me tell you what's in the court records, and
23 purports to tell what's in the court records to the
24 reporter and the reporter then produces a fair and
25 accurate description of what's in the records, the

1 reporter's entitled to the privilege, even under
2 *Bufalino*. *Bufalino* deals only with a situation where
3 what the Second Circuit is concerned about is a reporter
4 produces some completely baseless reporting and it turns
5 out someone can find a record later on to bear that out.
6 And that's what the -- the *Bufalino* case deals with.

7 Do you agree with that?

8 MR. WYATT: Yes, your Honor. And I think that
9 it's our position is that's essentially what's happening
10 here --

11 THE COURT: Okay. I get it. I didn't get it
12 from your pleadings. I get it now. You're making a
13 fourth argument, which is New Hampshire law should
14 include an exception to the fair report privilege so
15 that even where there's a fair and accurate report of a
16 pleading, where the report is attributed to a pleading,
17 that if the reporter acquires the information that
18 fairly and accurately reports the pleading from some
19 source unrelated to the pleading, that that can deprive
20 the reporter of the privilege.

21 MR. WYATT: I don't want to -- I don't want to
22 quibble, but in this case, the only evidence that --

23 THE COURT: I'm not interested in this case
24 now. I'm trying to understand the legal propositions
25 that you're arguing.

1 You are making an argument that the fair
2 report privilege is available only when there's a fair
3 and accurate report of a proceeding, right?

4 MR. WYATT: That's correct.

5 THE COURT: And you say, factually, we have
6 sufficiently alleged, even when construing all the
7 documents that you can construe, that the article does
8 not fairly and accurately report what the pleadings say,
9 right? That's your primary argument.

10 MR. WYATT: I don't know that I -- it is an
11 argument. I'm not sure --

12 THE COURT: Okay. I would say it's your
13 primary argument. You can characterize it the way you
14 want. Okay?

15 I also understand you to be making an argument
16 that the fair and accurate report privilege is subject
17 to an exception if the pleadings are reported on before
18 there has been judicial action on the matter in which
19 the pleadings have been filed. Right?

20 MR. WYATT: Correct, your Honor.

21 THE COURT: Okay. You're making that
22 argument.

23 I also understand you to be making an argument
24 that the fair report privilege does not apply where the
25 pleadings sufficiently allege that the defendant acted

1 with malice.

2 MR. WYATT: That's right.

3 THE COURT: Okay. And now I understand you to
4 be making a fourth argument, which is the -- the fair
5 report privilege does not apply when a report of a
6 pleading is made without any reliance on what's in the
7 pleading.

8 MR. WYATT: That's correct, your Honor. And I
9 would direct you --

10 THE COURT: Even if it's fair and accurate,
11 even if it's not made with malice, even if it's after a
12 judicial action in the proceeding, if it's -- if it is
13 made without reliance on the pleading, either directly
14 or indirectly, the privilege does not apply.

15 MR. WYATT: Your Honor, I -- I agree.

16 THE COURT: Just yes or no or that.

17 MR. WYATT: Yes, I agree. And I think if you
18 go read *Thomas* through this lens, you'll see there's a
19 discussion on page 333 about how the --

20 THE COURT: Okay. I'll get *Thomas* out. I've
21 got a copy of that here.

22 MR. WYATT: The discussion is, in essence,
23 there's some statements -- there were a bunch of
24 statements at issue in *Thomas*. There was a subset of
25 them that -- that the media defendant argued should

1 qualify for the privilege and the Court held that they
2 could not grant summary judgment --

3 THE COURT: What page did you say that you
4 want me to read?

5 MR. WYATT: Page 333, your Honor.

6 MR. SULLIVAN: May it please the Court, your
7 Honor.

8 THE COURT: No, let me talk to him and then
9 I'll come back and talk to you. Okay?

10 MR. SULLIVAN: I just have different page
11 numbers on the *Thomas* case. I'm just trying to find out
12 where -- exactly where we're going to be reading.

13 THE COURT: So you don't have a New Hampshire
14 Report version of it? If you have it -- even if you
15 have a Westlaw version, it should give the -- both the
16 New Hampshire Report cite and the Atlantic Reporter
17 cite.

18 What version do you have?

19 MR. SULLIVAN: I have one from the Supreme
20 Court of New Hampshire, which the page numbers are just
21 1 --

22 THE COURT: Do you have 155 N.H. 314? That's
23 what *Thomas* is. That's the --

24 MR. SULLIVAN: Well, I have the *Thomas* case,
25 your Honor --

1 THE COURT: Do you have a --

2 MR. SULLIVAN: I just don't have the cites
3 that the Court is referencing.

4 THE COURT: Okay. You have to follow along
5 then because I'm citing to the New Hampshire Supreme
6 Court -- do the best you can. I'm citing the
7 New Hampshire Supreme Court Official Reporter Version,
8 which is reported at 155 N.H. 314.

9 What is the page you want me to look at?

10 MR. WYATT: Page 333, your Honor. This is the
11 section of the opinion where the -- the media defendants
12 are arguing that certain sections are within the
13 privilege because they're, quote, derived from police
14 and court records.

15 THE COURT: Okay. It's in headnote 36. I
16 don't know, Counsel, if you have it with headnotes, but
17 it's -- it begins on the paragraph: We now turn to the
18 Telegraph defendants' second contention.

19 Is that what you want to talk to me about,
20 Counsel? What is it you want to draw to my attention?

21 MR. WYATT: In the paragraph, it says: In
22 support of their position that statements 20 to 23
23 derived from official records --

24 THE COURT: Okay. I've got that. That's on
25 page -- it's halfway between 333 and 334. It's on page

1 1011 of the Atlantic Reports cite. And you want me to
2 read that paragraph and you think that paragraph
3 supports your position?

4 MR. WYATT: Oh, I'm sorry, your Honor, it's
5 two paragraphs up. It begins: The Telegraph defendants
6 argue that all of the statements attributable to the
7 officers --

8 They go on to decline the summary judgment
9 because it's unclear from that record --

10 THE COURT: Wait a -- wait. Let me read the
11 paragraphs.

12 Okay. The paragraphs you're citing don't
13 support the position that you're taking. They --
14 what -- if you read it carefully, what it says is: With
15 respect to the records Gosselin allegedly summarized,
16 the Telegraph defendants cite pages 103 to 120 of the
17 appendix, all but two of which were documents dated
18 after the publication of the article. Consequently, on
19 this record, we have no way of evaluating whether
20 Gosselin was relying upon or summarizing any given
21 record at the time of his interview. Other police
22 records are also contained in the appendix, but neither
23 the Telegraph nor the defendants -- nor the officers'
24 affidavits explain which particular records the officers
25 relied upon at the time of the interview. Thus, even

1 assuming the Telegraph defendants' argument is legally
2 correct, the absence of such an explanation and the
3 requirement that all inferences must be construed in
4 favor of the plaintiff mean that summary judgment was
5 correctly denied.

6 What they're saying there is the records in
7 that case don't allow the allegedly false statements to
8 be tied to any particular record. Some of the records
9 were produced after the statements were made. Others
10 are in there, but we can't tell which it was allegedly
11 tied to.

12 So I agree; to the extent somebody just blurts
13 out fair report privilege and points to a big mass of
14 records and says, it's in their somewhere, you can't
15 get -- but that doesn't -- you're arguing a very
16 different proposition that the Restatement (Second) does
17 not recognize at all. There's nothing in the
18 Restatement (Second) that I've read that supports this
19 new exception that you're arguing for.

20 But I recognize that this -- you do cite these
21 out-of New Hampshire cases that suggest that at least in
22 circumstances where there is neither direct nor indirect
23 reliance on a record that the privilege is unavailable.
24 And you say there's neither direct -- you could find --
25 you -- construing this evidence in the light most

1 favorable to us, construing the record, the allegations
2 in the complaint and the documents that the complaint
3 references and that are records that a court can
4 consider on a 12(b)(6) motion, the complaint alleges a
5 plausible claim that the writer of the article neither
6 actually relied on directly nor indirectly relied on any
7 of the pleadings when he or she wrote the article.

8 That's -- and, therefore, it -- even if it's
9 accurate, even if it's not done with malice, and even if
10 it follows a judicial action, it's not protected by the
11 privilege.

12 MR. WYATT: Correct.

13 THE COURT: Okay. Have we got any other
14 exceptions that you want to argue or have we now
15 captured of universe of them?

16 MR. WYATT: That's the universe, your Honor.

17 THE COURT: Okay. All right. So you say the
18 fair report privilege applies. They say there are four
19 reasons why it does not. Okay?

20 Now, it wasn't all that clear in their
21 pleadings, but I understand now that they have four
22 reasons, one of which we'll talk about first because
23 I've had some discussion with plaintiffs' counsel about
24 it, is an argument that even if the report is entirely
25 fair and accurate, even if it was not -- even if it was

1 made after judicial action and even if it was made
2 without malice, if the evidence in the case is -- if the
3 allegations are that the reporter neither -- relied
4 neither directly nor indirectly on the pleading that the
5 privilege is unavailable.

6 What do you want to say to that argument?

7 MR. SULLIVAN: Thank you, your Honor.

8 I'd cite first the Restatement of Torts
9 (Second), Section 611, subsection (e), which deals with
10 the necessity of official action in judicial
11 proceedings. And it says, in part: It is not
12 necessary, however, that a final disposition be made of
13 the matter in question. It is enough that some judicial
14 action has been taken so that in the normal progress of
15 the proceeding, a final decision will be rendered.

16 So Exhibit 2 to the plaintiffs' opposition --
17 memorandum in opposition contains the civil minutes of
18 the United States District Court for the Central
19 District of California, minutes of a proceeding dated
20 November 29, 2016, in which the Court deals with the
21 issues of Karpinski's allegation of sexual assault and
22 harassment and goes on to say: Karpinski has posted
23 public accusations of sexual assault by Cahill on her
24 Instagram profile and other public websites.

25 And I cite that language, your Honor, because

1 I'm going to refer to it again with respect to some of
2 the other counts in this complaint. But clearly there
3 was judicial action --

4 THE COURT: Okay.

5 MR. SULLIVAN: -- taken in this proceeding.

6 THE COURT: I want to give you a fair chance
7 here because I didn't understand him to be making this
8 argument.

9 So you're dealing with a different argument
10 than the one I've just asked you to address. Okay? He
11 has said there are four arguments in his pleadings.

12 MR. SULLIVAN: Right.

13 THE COURT: The official action is one of the
14 arguments, but we're not addressing that now.

15 MR. SULLIVAN: I'm -- I'm sorry. That's what
16 I thought you wanted me to address first --

17 THE COURT: No.

18 MR. SULLIVAN: -- the judicial action.

19 THE COURT: Okay. Let me explain it again.
20 Okay?

21 There are four arguments. Argument number one
22 is it's not fair and accurate.

23 MR. SULLIVAN: Oh, I'm sorry.

24 THE COURT: We're not going to -- I'll tell
25 you which order to address them.

1 Argument number two is the defendants acted
2 with malice.

3 Argument number three is there was no official
4 action.

5 And argument number four, the one I want you
6 to address now, is a new argument that I didn't
7 understand -- I didn't find in his pleadings, but he's
8 told me is there and he's cited cases to support it.
9 The fourth argument is the one I want you to address
10 now.

11 MR. SULLIVAN: Okay.

12 THE COURT: That argument is that regardless
13 of these other problems, even if all those other
14 problems are solved, you can't claim the privilege
15 because your reporter did not rely either directly or
16 indirectly on any filings in the court case.

17 He says that first there's a legal question.
18 Is that an exception to the fair report privilege,
19 because the Restatement doesn't include it and I can't
20 find any New Hampshire law case that includes it, but he
21 has cited a -- at least once case, *Bufalino*, a Second
22 Circuit case, construing Pennsylvania law that seems to
23 suggest this pleading. So there's this new exception.

24 So, one, is there this exception as a matter
25 of law and, two, if there is, does that exception apply

1 on the facts of this case?

2 So could you address that, those issues first?

3 MR. SULLIVAN: I will, your Honor.

4 Number one, I don't think the exception does
5 apply to New Hampshire law. If it ever were presented,
6 I think it would be very bad law to punish a publication
7 who presents a fair and accurate report of judicial
8 proceedings.

9 THE COURT: Yeah, see, the -- I think one of
10 the reasons why the Restatement rule is crafted the way
11 it is is that the exception he's invoking really
12 requires delving into the facts of the case in most
13 instances to determine what the reporter actually did,
14 whereas the fair report privilege often can be
15 determined simply by take the article, take the report,
16 compare them, how -- how accurate does the article
17 report on the -- does the article report on the
18 pleading. And if you have to then go and say, well, but
19 did you -- were there two intermediaries, were there
20 three, did he find something else, that would be quite
21 problematic.

22 I think the issue that the Court was getting
23 at in *Bufalino* is in a case in which a reporter reports
24 about something and then has nothing to do with a
25 pleading, but you find a pleading months later that

1 arguably says what the article says, can you claim the
2 privilege. But that's not what we have here.

3 MR. SULLIVAN: That's clearly not this case,
4 your Honor.

5 Number one, each of the complained-of
6 statements are taken directly from the pleadings in the
7 California case.

8 Secondly, and perhaps most importantly, I
9 don't believe those quotes -- and they're in quotes in
10 the complaint and in the story -- I don't believe are
11 contained in any of the information that was provided to
12 the Union Leader Corporation by this Denterlein PR
13 group.

14 THE COURT: What -- can you tell me, is there
15 any dispute in this case as to what records were
16 provided from the Denterlein public relations person to
17 the reporter?

18 MR. SULLIVAN: I'm aware only of the emails
19 that have been attached to the -- these pleadings and to
20 the deposition of Olivia Karpinski. That for sure I
21 know was provided to Patricia Grossmith.

22 Now, that tells me that --

23 THE COURT: Or the amended complaint provided.

24 MR. SULLIVAN: I don't know. I -- the only
25 thing I know for sure are the emails and the deposition.

1 That's all I've --

2 THE COURT: Okay.

3 MR. SULLIVAN: -- seen. That's all I've been
4 able to obtain from my client.

5 THE COURT: All right. So -- and what do the
6 emails do? Do they summarize what's in the -- in the
7 pleadings?

8 MR. SULLIVAN: Not really. I -- parts of the
9 pleadings are summarized in those emails, but certainly
10 I don't believe the direct quotes that are in the
11 Grossmith story and that are exactly from the pleadings
12 in the California case I do not believe were provided by
13 Denterlein.

14 THE COURT: What do you -- what do the
15 plaintiffs allege about what the basis for the
16 reporter's report was? Do you have allegations in your
17 complaint that allege that the reporter wrote the story
18 without looking at the -- any of the pleadings in the
19 underlying case?

20 MR. WYATT: Your Honor, as far as we know,
21 we've only seen the emails --

22 THE COURT: No, I'm asking what you allege in
23 your complaint. What allegations are included in your
24 complaint?

25 This is hard for me because, as I said, I

1 couldn't understand that you were even making this
2 argument in your brief. So that's why we're going to
3 have to pick it apart right now so I can fully
4 understand it.

5 What in your complaint do you allege about
6 the -- the way in which the four statements at issue
7 here were acquired by the -- the information supporting
8 those were acquired by the plaintiffs?

9 MR. WYATT: Your Honor, I'm looking at
10 paragraph 30 of our complaint. It says: Upon
11 information and belief, Ms. Grossmith, the Union Leader
12 and its agents performed no independent investigation of
13 the facts and circumstances surrounding this California
14 litigation and took no or virtually no steps to verify
15 what Denterlein had presented to it.

16 THE COURT: Okay. So my -- again, I
17 misunderstood you. I understood that to be a statement
18 that they didn't independently investigate to see
19 whether the allegations in the pleadings were true. And
20 you agree there's no obligation to do that in order to
21 claim the fair report privilege.

22 MR. WYATT: I would not agree, your Honor.

23 THE COURT: Okay. So -- we just have such --
24 I mean -- okay.

25 You know, I try to -- we've been preparing for

1 this case for a long time and that I can't even
2 understand what you're saying is really quite
3 frustrating to me.

4 I -- you are -- you are saying that -- tell me
5 again what Denterlein -- you allege about Denterlein and
6 the reporter.

7 MR. WYATT: Paragraph 30 of the complaint
8 reads: Upon information and belief, Ms. Grossmith, the
9 Union Leader and its agents performed no independent
10 investigation of the facts and circumstances surrounding
11 this California litigation and took no or virtually no
12 steps to verify what Denterlein presented to it.

13 THE COURT: And what do you mean by verify
14 what to -- I understood verify to mean to ascertain the
15 truth of the facts. Is that what you meant by verify?

16 MR. WYATT: Yes, your Honor.

17 THE COURT: Okay. That's clearly wrong for
18 the fair report privilege. So if what you meant by
19 verify -- verify that, in fact, these documents had been
20 filed in a court, but that's not what you meant. You
21 meant verify that the underlying allegations are --
22 reflected in the pleadings are true.

23 MR. WYATT: Your Honor, in context, this
24 allegation and complaint is talking about -- the
25 preceding allegations talk about email information that

1 was provided to Union Leader in the form of a summary
2 and that's what we're saying they did not verify.

3 THE COURT: But -- okay. Oh, this is going to
4 be a long afternoon, folks.

5 All right. Let's pull out the individual
6 statements. Okay? We'll try it this way.

7 One of the three statements -- four
8 statements -- that you say is defamatory is the
9 following statement: Edalat and Karpinski also allegedly
10 planted THC and marijuana in the office of the
11 PharmaPak's chief scientist and then telephoned Irvine
12 Police to falsely report that the scientist and Cahill
13 were manufacturing and distributing illegal drugs, court
14 records state.

15 Right? That is one of your our statements, is
16 it not?

17 MR. WYATT: That's correct, your Honor.

18 THE COURT: Okay. Now, the court records
19 in this -- in the underlying case, there is an
20 allegation -- the second amended complaint in the case
21 says: In early 2000 -- mid-2016, after plaintiffs
22 discovered the fraud described above, and in order to
23 attempt to further injure PharmaPak and defendant
24 Cahill, defendants Edalat and Karpinski, who have been
25 trafficking in illegal controlled substances in

1 violation of 21 U.S.C. Section 841 and California law,
2 planted in on around February 15, 2016, THC and
3 marijuana, both illegal controlled substances, in the
4 offices of the chief scientist of PharmaPak and then
5 called the local Irvine Police Department in order to
6 cause his arrest and the arrest of plaintiff Cahill, who
7 was then CEO of PharmaPak, all to further injure
8 PharmaPak.

9 That's right in the amended complaint, second
10 amended complaint, right? That is the allegation that
11 is summarized in the statement I've read to you, which
12 is one of your defamatory statements.

13 What the fair report privilege is required --
14 is requiring that the statement fairly and accurately
15 report what's in the pleading. It doesn't require any
16 independent investigation of what is in the pleading.
17 In fact, even if the newspaper knows the statement is
18 false, the privilege applies. Do you think that's
19 wrong?

20 MR. WYATT: I think -- as I read the
21 restatement, that's -- that's not how I read it, your
22 Honor.

23 THE COURT: Okay. So let's set aside this
24 now fourth argument, because it's going to create
25 tremendous -- we'll come back to it in -- towards the

1 end. Let's try to start at the beginning. Okay? And
2 let's look at what the restatement says. Okay?

3 And you -- your view is that New Hampshire
4 largely follows the Second Restatement, Section 611,
5 with respect to this fair report privilege, right?

6 MR. WYATT: Yes, your Honor.

7 THE COURT: Okay. All right. Here's what it
8 says: The privilege is, therefore, one of general
9 publication and is not limited to publication to any
10 person or group of persons for the same reason the
11 privilege exists even though the publisher himself does
12 not believe the defamatory words report -- he reports to
13 be true and even when he knows them to be false.

14 I'm reading from the Restatement. Right?

15 MR. WYATT: Which comment, your Honor?

16 THE COURT: I'm looking at comment (a),
17 character and privilege. All right? Tell me -- I mean,
18 at some point we have to agree on what -- you know,
19 basic things like what the Restatement says. It says
20 specifically, even if you know it's false, you can get
21 the privilege.

22 MR. WYATT: Right. Your Honor, comment (e)
23 discusses specifically reporting on preliminary
24 complaints filed in court.

25 THE COURT: Don't mix -- you have several

1 arguments, okay, one of which is an argument on malice
2 and you seem to be under the view that your concept of
3 malice can leave a newspaper liable for a -- an
4 otherwise fair and accurate report if the paper acted
5 with malice. And you seem to say your version of malice
6 is -- fails to properly investigate and recklessly
7 report the truth. Right? That's your -- one of your
8 arguments.

9 MR. WYATT: Yes, your Honor.

10 THE COURT: And the -- the Restatement makes
11 clear that even when you know it's false, the privilege
12 is still available for you. And I think that argument
13 about investigation fits under the -- under the argument
14 about malice.

15 And it -- and I think we need to go and look
16 at -- we need to look at *Thomas*, which you just cited to
17 me, and *Yohe*, which is a First Circuit case. All right?
18 Are you familiar with those cases? You're familiar with
19 *Thomas*, right?

20 MR. WYATT: I am, your Honor.

21 THE COURT: Okay. If we turn to page 330,
22 the -- New Hampshire Supreme Court says: However, that
23 is not the proper inquiry. In the context of the fair
24 report privilege, the malice inquiry, to the extent it
25 is even properly before a court, focuses upon the

1 attitude of the defendant publisher vis-a-vis the
2 plaintiff. The plaintiff cannot defeat summary judgment
3 wholesale on the fair report privilege by first
4 asserting malice on the part of police officers and then
5 attempting to impute the malice to the Telegraph
6 defendants by conclusory assertion, nor do allegations
7 that the Telegraph was careless amount to malice.
8 Arguments about the accuracy of the article bear upon
9 whether it was accurate and complete or a fair
10 abridgement of the occurrence reported.

11 And so they reject the conception of malice
12 that you're talking about. And on the prior page they
13 make clear that -- they -- they cite the following from
14 *Yohe*: The Court also noted that to defeat the fair
15 report privilege, a plaintiff must either show that the
16 publisher does not give fair -- a fair and accurate
17 report of the official statement or malice. Taken
18 together, these two statements indicate that actual
19 malice cannot defeat the fair report privilege, but
20 common law malice can.

21 So what the court in *Thomas* is saying to you
22 is you are mistaken when you use the actual malice
23 standard of defamation to determine whether the fair
24 report privilege is unavailable to a -- a defendant.
25 Instead, it is the common law malice requirement that is

1 required, which requires proof of ill will, not failure
2 to verify. Okay?

3 So where do you get this idea that a failure
4 to verify can support malice?

5 MR. WYATT: I guess I would say, your Honor,
6 that failure to verify sheds light on the intent of the
7 actor. And there are First Circuit cases saying that
8 reliance on a questionable source can constitute the
9 kind of malice that sacrifices the privilege.

10 THE COURT: You're familiar with the
11 First Circuit's case in *Yohe*? It discusses
12 Massachusetts law, but it is cited by the New Hampshire
13 Supreme Court favorably in *Thomas*.

14 Here's what the court says in *Yohe*: The
15 privilege might still be vitiated by misconduct on the
16 newspaper's part, but that misconduct must amount to
17 more than negligent or even knowing republication of an
18 inaccurate official statement. To defeat the privilege,
19 a plaintiff must either show that the publisher does not
20 give a fair and accurate report of the statement or
21 malice. However, the Appeals Court of Massachusetts has
22 pointed out malice must require some redefinition if it
23 were not to comprehend knowing falsehood; perhaps
24 repetition of such falsehood with a purpose to do the
25 complainant maximum injury would still qualify as

1 malice.

2 See, you can't have the actual malice standard
3 apply here if what the Restatement says is true, which
4 is even the publication of a -- a knowing publication of
5 a false statement that accurately reports in a pleading
6 can't support a defamation claim because the fair report
7 privilege protects that statement.

8 So even a knowing -- the Union Leader could
9 have known that the statement was false and if it
10 accurately put -- reported what the statement says, it's
11 not -- it's protected by the fair report privilege.

12 So if that's true, then the conception of
13 malice that you are using, which is the actual malice
14 standard for whether a defamation can be maintained by a
15 public figure, applies here and it's not the right
16 standard because you can't use -- as the court in *Yohe*
17 noted and the court in the -- the New Hampshire Supreme
18 Court adopted, you can't have the privilege protect a
19 knowing -- publication of a knowingly false statement
20 and still subject that privilege to the actual malice
21 standard.

22 Is that -- am I being clear about what I'm
23 saying?

24 MR. WYATT: I understand, your Honor.

25 THE COURT: What's your response to that?

1 MR. WYATT: Well, your Honor, if the standard
2 is that the article has to be published to cause injury,
3 with an intent to cause injury, we would say they --
4 they -- the way the article was drafted is the method by
5 which it did that, which is the inaccuracies of the
6 article.

7 THE COURT: Okay. Where in your complaint do
8 you allege that -- not the -- I -- look, I understand
9 the -- the party who is on the other side of this
10 lawsuit from your client, his motivations we're not
11 going to speculate about. But I didn't see anything in
12 your complaint that said the Union Leader was acting out
13 of ill will towards your client. I see something -- you
14 use the word malice, but you use it in the conclusory
15 way and it's clear from your motion that -- your
16 response to the motion to dismiss that you're using the
17 actual malice standard, not the common law malice
18 standard, which the supreme court says you have to use.

19 What is it there in your complaint that says
20 that the Union Leader acted with a bad motivation to
21 harm your client rather than simply reporting what's in
22 the records?

23 MR. WYATT: Your Honor, paragraph 44 of the
24 complaint says as follows. Quote: The Union Leader,
25 Ms. Grossmith, and its agent acted maliciously and were

1 well aware that they published the foregoing false
2 and/or misleading statements of fact and did so in the
3 larger context of a one-sided article aiming to, open
4 parentheses, or substantially certain to, closed
5 parentheses, malign the reputations and standing --

6 THE COURT: Well, okay. Aiming or. That --
7 you know, that is -- what you're really saying is
8 because it hurt them, we must conclude that they were
9 trying to hurt them.

10 That -- I don't think that's a sufficient
11 pleading to show -- to plead malice. Are you going to
12 really prove that the -- if I let you go forward -- that
13 they were doing it with the purpose to injure, not just
14 because they want to make scurrilous allegations because
15 they will sell papers? Because let's suppose they knew
16 it was false and they said, oh, this will be great,
17 it'll sell some papers. That isn't with an
18 interpretation to injure.

19 Because underlying -- you see, underlying the
20 fair report privilege is a public policy that encourages
21 the publication of what's in official proceedings and
22 public documents. There's a public interest in knowing
23 what allegations are being made in official court
24 filings. So we don't want to punish people who report
25 accurately what's in court filings and we don't want to

1 have them be required to investigate the truth of those
2 allegations because there's a sufficient public interest
3 in having them publicized that we don't want to subject
4 the person doing the publication to punishment if it
5 turns out that what's in the pleading is false and
6 damaging.

7 So, you know, I -- okay. So I -- I take your
8 point. You're saying that that language you quote is
9 sufficient to create a -- a plausible -- to allege a
10 plausible claim.

11 MR. WYATT: Well, your Honor, there's another
12 allegation. Paragraph 46 says as follows: In a further
13 attempt to humiliate Ms. Karpinski and damage her
14 reputation in her local community, the article's
15 headline exploited the fact that Ms. Karpinski was a
16 New Hampshire pageant finalist. Ms. Karpinski had
17 developed an excellent reputation in her community and
18 the pageant community through hard work, volunteerism,
19 and the like.

20 THE COURT: All right. I'll make note of
21 that, but are you really going to try to prove the Union
22 Leader was trying to injure her? That's what -- because
23 that's what you would have to prove. Otherwise, you
24 would go through and spend all this time and money and
25 acquire zero. Okay? Are you really going to prove

1 that?

2 MR. WYATT: Your Honor, we've alleged it and
3 we would press it as a basis.

4 THE COURT: Okay. But I -- if I let the case
5 go through on that basis, you better end up having a
6 good faith basis for it or you should abandon the claim.
7 Because that -- you're going to have to prove common law
8 malice. You can't prove that it's damaging to
9 Ms. Karpinski. Do you understand?

10 MR. WYATT: I understand.

11 THE COURT: All right. I mean, I think it's a
12 very strained pleading. Whether it's sufficient or not
13 I'll take under advisement. I recognize that you can
14 plead scienter generally under Rule 8, but you're going
15 to have to prove scienter and you're going have to
16 survive summary judgment, you're going to have to have a
17 triable case that you can -- a jury could find scienter
18 here, that is, that they were acting out of an ill will
19 and not simply reporting what's in a pleading.

20 What do you -- so we've now moved into malice.
21 What do you say to his malice argument?

22 MR. SULLIVAN: I think it's just a naked
23 conclusory allegation without any factual allegations in
24 support. I cite the case of *Drake vs. Town of New*
25 *Boston* on two counts here. Drake's complaint is utterly

1 lacking any factual allegations that would support a
2 plausible inference that the defendants entered into an
3 agreement to conspire against her. And I cite that on
4 the conspiracy count, but I also cite it on the malice
5 allegation. They just allege it with no factual
6 support.

7 That *Drake v. Town of New Boston* is --

8 THE COURT: I have it. I've read it.

9 MR. SULLIVAN: Thank you, your Honor.

10 I'd like to point out some things about the
11 article itself, your Honor, if I may.

12 THE COURT: Well, I'd like to deal with it in
13 an organized way.

14 MR. SULLIVAN: On this issue.

15 THE COURT: On malice.

16 MR. SULLIVAN: On this issue.

17 THE COURT: Yeah.

18 MR. SULLIVAN: The very beginning of the
19 article, the reporter calls Attorney Saied Kashani of
20 Los Angeles, who represents both Karpinski & Edalat. He
21 said: They will prove at trial, which is slated to
22 begin July 24th, that there is no merit to the lawsuit
23 and that Karpinski, who he described as a junior
24 employee, was unfairly dragged into it.

25 Later on in the article, Kashani again --

1 Kashani said his clients deny the allegations and said
2 the lawsuit was a preemptive strike against Karpinski,
3 who was preparing her own lawsuit against Cahill for
4 wrongful termination.

5 There's no -- there's no bias, there's no
6 malice. This is both sides -- counsel for both sides of
7 the parties in the California suit were contacted and
8 quoted in the article.

9 I have other things to get back to, your
10 Honor --

11 THE COURT: Well --

12 MR. SULLIVAN: -- but the malice --

13 THE COURT: -- we'll do it my way and then
14 I'll give you a chance at the end --

15 MR. SULLIVAN: All right.

16 THE COURT: -- to say anything you want to
17 say.

18 MR. SULLIVAN: All right. Well, the malice
19 is -- it's a conclusory allegation. It's not sufficient
20 to survive a motion to dismiss.

21 THE COURT: All right. So he's got -- you've
22 identified those allegations in the complaint that you
23 say sufficiently plead malice, right? There's nothing
24 else in your complaint that you say pleads malice?

25 MR. WYATT: Your Honor, I would -- I'm not

1 prepared to abandon anything in the complaint --

2 THE COURT: Well, no, but you need to tell
3 me -- if there's more, you need to -- now is your chance
4 to tell me, because you're on the verge of me rejecting
5 your malice argument. So if there's more in the
6 complaint that you say supports malice pleading,
7 identify it now.

8 MR. WYATT: Well, your Honor, for one, the
9 Union Leader eventually did take this article down.

10 THE COURT: Look at the complaint. Tell me
11 what's in the complaint that alleges malice.

12 MR. WYATT: Paragraph 60, your Honor,
13 discusses about how after the trial, Ms. Karpinski
14 emailed Mr. -- is it Spiner? --

15 MR. SULLIVAN: Yes.

16 MR. WYATT: -- Mr. Spiner and -- to, quote,
17 set the record straight, to explain the trial outcome,
18 to make the Union Leader understand the harm its article
19 caused and was still causing, to provide links to
20 articles referencing the trial outcome, and to request a
21 retraction, yet Mr. Spiner and the Union Leader refused
22 to remove the article, causing further harm to the
23 plaintiffs. Mr. Spiner failed to have the article taken
24 down, apparently failed to research or investigate the
25 article in much the same way as Ms. Grossmith, even

1 knowing the trial outcome, and in that regard,
2 Mr. Spiner is complicit and individually at fault and
3 liable for the Union Leader's --

4 THE COURT: So the failure to retract is
5 evidence of malice --

6 MR. WYATT: Once.

7 THE COURT: -- was malice pleading, in your
8 view.

9 MR. WYATT: Once they knew the harm had been
10 caused, your Honor, not only did they not take it down,
11 but then they eventually did take it down.

12 And the next paragraph of the complaint,
13 paragraph 61, says: Only recently, after being named in
14 a suit in California --

15 THE COURT: So evidence that they didn't take
16 it down is evidence of malice and evidence that they did
17 take it down is evidence of malice. That's what you're
18 saying?

19 MR. WYATT: Correct, your Honor.

20 THE COURT: So everything they do is malice,
21 malice, malice. Because if they leave it up, that's
22 malice; if they take it down, that's malice.

23 MR. WYATT: Your Honor, it -- you pose a
24 question of did they know and intend to cause her harm.
25 I believe these facts --

1 THE COURT: It's not no; it's did they intend
2 to -- it's did they act out of ill will, which is what
3 malice is.

4 And -- okay. So you've identified -- is there
5 anything else? I will comment on all of this in the
6 order that I write. Is there anything else?

7 MR. WYATT: Well, I think the -- the
8 suggestion, your Honor, that Ms. Karpinski recanted her
9 sexual harassment allegations under oath is inaccurate
10 to the point of being malice.

11 THE COURT: Okay. So that it's so inaccurate
12 that you can infer maliciousness from it.

13 MR. WYATT: Yes, your Honor --

14 THE COURT: Okay.

15 MR. WYATT: -- particularly where she was
16 provided --

17 THE COURT: I'd just ask my clerk to make note
18 of each of these because we're going to have to try to
19 take it up in the order.

20 All right. Anything else on malice?

21 MR. WYATT: No, your Honor.

22 THE COURT: Okay. All right.

23 What else did you want to say on malice?

24 MR. SULLIVAN: I'd like to respond to that
25 last point, your Honor.

1 The deposition of Olivia Karpinski has been
2 submitted.

3 Did he ever touch you at any time -- did he
4 ever at any time touch you in or around your breast
5 area --

6 THE COURT: Okay. I've read that. I'm going
7 to deal with that on fair and accurate, not on malice.
8 Okay? So we'll come back to it.

9 Okay. Anything else on malice?

10 MR. SULLIVAN: No.

11 THE COURT: Okay.

12 MR. SULLIVAN: There's no factual support for
13 a malice complaint.

14 THE COURT: Yeah, I -- I -- I'm inclined to
15 agree with you on that point because I think the
16 pleading on malice is so bare and conclusory as to not
17 sufficiently plead a plausible claim that if the fair
18 report privilege is otherwise applicable, it should be
19 denied to the defendant here because they acted out of
20 ill will in publishing the article.

21 I see a few bare, conclusory allegations.
22 What I'm going to try to do is reconcile the fact that
23 scienter can be pleaded generally with language in *Iqbal*
24 and *Twombly* and First Circuit precedent interpreting
25 *Iqbal* and *Twombly* that at the 12(b)(6) stage, you should

1 strip out conclusory allegations from the complaint and
2 look at what remains and ask whether it pleads a
3 plausible claim.

4 That's the ordinary standard I should use.
5 And yet when it comes to a scienter allegation like ill
6 will, those ordinarily can be pleaded generally and
7 survive a 12(b)(6) analysis. So I'm going to try to
8 analyze those particular issues. Okay?

9 All right. Let's move on. I think maybe
10 we'll get -- make with more -- make more headway if we
11 deal with the plaintiffs' claim that the statements are
12 not fair and accurate.

13 You -- you allege that they don't accurately
14 report what's in the pleadings; is that right?

15 MR. WYATT: Yes, your Honor, or it's not a
16 fair abridgement, in some instances.

17 THE COURT: Okay. Let's look at each one of
18 these statements and then let's look at the
19 corresponding language in the pleadings and you tell me
20 why that isn't a fair and accurate report of what's in
21 the pleading.

22 The first two defamatory statements that you
23 allege are the following: A former beauty queen from
24 Auburn is among those being sued in California in a
25 fraud case involving allegations that at least 2.3

1 million of investors' money in a pharmaceutical company
2 was used on junkets to Las Vegas and other lavish items.

3 Okay? So that's the first statement.

4 And the related second statement is: While
5 Karpinski was working for PharmaPak, she traveled to
6 Las Vegas and, along with Edalat, wine and dined
7 potential investors for Sentar Pharmaceuticals, another
8 company formed by Edalat. PharmaPak was billed for the
9 expenses, according to Cahill.

10 The second amended complaint contains the
11 following allegation: In addition to fraudulently
12 stating her experience in order to perpetrate a fraud on
13 PharmaPak, Karpinski and Edalat also fraudulently stated
14 that what she was doing after she was -- fraudulently
15 stated what she was doing after she was hired. In
16 furtherance of the scheme to defraud PharmaPak,
17 Karpinski was placed on the payroll of PharmaPak in
18 June of 2015 and until PharmaPak was forced to cease
19 operations in early March 2016 because it had no money
20 with which to operate. Karpinski spent most of her time
21 not working on PharmaPak matters, but, rather, working
22 with Edalat to further develop Global Holdings d/b/a
23 Sentar Pharmaceuticals by seeking investors for it.
24 Edalat and Karpinski promoted Global Holdings, d/b/a
25 Sentar Pharmaceuticals, by traveling to Las Vegas,

1 Nevada, and Beverly Hills on frequent occasions and,
2 using PharmaPak funds, lavishly entertained prospective
3 customers and investors for Global Holdings d/b/a Sentar
4 Pharmaceuticals while falsely stating to Bruce Cahill
5 and others at PharmaPak that they were engaging in this
6 promotional activity in order to further PharmaPak by
7 obtaining sales contracts for PharmaPak.

8 How do these two statements -- are they not a
9 fair and accurate report of what I have just read to
10 you?

11 MR. WYATT: Your Honor, your question gets
12 at -- and I agree with it, that the report maps onto
13 certain allegations in the second amended complaint. I
14 do not dispute that.

15 What we do dispute is that -- and I know this
16 is an issue -- this is another issue we haven't really
17 talked about, but whether the -- that complaint itself
18 can form the basis for a report.

19 Putting that aside, we would say that plucking
20 these two allegations out of that second amended
21 complaint alone and making these assertions without any
22 discussion of the other things in the complaint or the
23 litigation generally is not a fair abridgement of what
24 was occurring in that litigation.

25 THE COURT: The -- you are not alleging that

1 the whole complaint is -- the whole article is
2 defamatory. You have identified the defamatory
3 statements. What is it about what's in this -- the
4 article, these two statements that I've read, that
5 doesn't -- isn't -- doesn't fairly and accurately
6 describe the excerpt from the pleading I've read to you?

7 MR. WYATT: Our view, your Honor, is that the
8 way they're abridged and taken is to make it look like
9 Cahill was the victim.

10 THE COURT: That's what he was alleging in the
11 complaint. He was alleging that he was the victim and
12 the article reports that he was alleging these things.
13 And it also reported that she denied them.

14 MR. WYATT: Well, your Honor, it did have a
15 couple of base-tagging exercises where it had
16 statements, she denied them, but the gist and the sting
17 of the article, which is what's supposed to be reviewed,
18 is that Cahill was the victim of their conduct.

19 THE COURT: That's what the complaint alleges.

20 MR. WYATT: I -- well, I agree that --

21 THE COURT: You should have -- what you're
22 really after is they never should have reported what
23 Cahill was claiming about her.

24 MR. WYATT: I agree with that, your Honor.

25 THE COURT: Yeah.

1 MR. WYATT: Or --

2 THE COURT: And that's completely wrong,
3 though. If you think that's what I think the law is,
4 you're completely misunderstanding the law.

5 The -- the newspaper, as I said -- we have a
6 fair report privilege because the New Hampshire Supreme
7 Court, adopting the reasoning of the Restatement
8 (Second), has decided that there is an important public
9 interest served by reporting on occurrences in official
10 proceedings and whether those allegations in official
11 reports are true or false does not matter. The -- there
12 is a public policy that encourages the accurate report
13 of those allegations.

14 And this -- these two statements, in my mind,
15 appear to track exactly on an allegation from the
16 amended complaint. And if I -- and your response to
17 this, so that I understand it, is while that may be true
18 when read in isolation, if you read all of the filings
19 in the case, a fair report would have said something
20 different. What is it that the fair report would have
21 said?

22 MR. WYATT: Well, your Honor, backing up, I --
23 I guess I'm looking at comment (e) of the Restatement to
24 say there's --

25 THE COURT: Don't shift on me. We're going to

1 come back and I'll give you a full and fair opportunity
2 to argue comment (e) --

3 MR. WYATT: Okay.

4 THE COURT: -- which deals with this issue of
5 whether there has been judicial action. Okay? So
6 you'll get your chance on that.

7 MR. WYATT: Okay.

8 THE COURT: I don't know why lawyers cannot
9 seem to understand you need to deal with each legal
10 argument on its own. Don't shift back and forth. You
11 have an argument here that this is not a fair and
12 accurate report. Right?

13 MR. WYATT: Yes, your Honor.

14 THE COURT: And I'm evaluating that argument
15 now.

16 So, tell me, is -- what is it that this
17 paragraph -- statement one and statement two should have
18 included that they did not include in order -- that --
19 in ways that prevented it from being fair and accurate?

20 MR. WYATT: It did not report the fact that it
21 was in Mr. Cahill's second amended complaint, not his
22 prior two complaints; it made no mention of Olivia and
23 Paul's claims against Mr. Cahill themselves; and it made
24 no -- no mention -- well, this was -- this will be one
25 of the other defamatory statements.

1 Those are the propositions, your Honor.

2 THE COURT: Okay. All right. Let's go to the
3 third statement. I've already read it to you once and
4 I've also read what's in the amended complaint.

5 Again, that statement appears to track
6 directly language in the -- I believe it's the second
7 amended complaint. And can you tell me what is not fair
8 or accurate about the reporting of that statement?

9 MR. WYATT: The same, your Honor, that it --
10 it does not make clear that these were in his second
11 amended complaint and not the prior two complaints and
12 it does not describe the claims that were filed against
13 Mr. Cahill.

14 THE COURT: All right. So it doesn't describe
15 what her counterclaims are and Edalat's counterclaims.
16 You think the article had to do that in order to be fair
17 and accurate.

18 MR. WYATT: Yes, your Honor. And to be fair,
19 it does make a mention of the sexual harassment
20 counterclaim, which is the other defamatory statement.

21 THE COURT: Okay. The first three, it seems
22 to me, are completely accurate summaries of filings in
23 the second amended complaint. I -- I don't see how we
24 could conclude otherwise. They track the language
25 pretty much exactly.

1 I -- I do want to ask defendants' counsel to
2 help me on the fourth statement. Let me first read the
3 statement.

4 And so Edalat had accused Cahill of sexually
5 harassing Karpinski, but under oath she later admitted
6 that the allegations were baseless, according to court
7 records.

8 Do the underlying pleadings in this case
9 allege that -- in the California case -- ever contain an
10 allegation that Edalat has accused Cahill of sexually
11 harassing Karpinski?

12 MR. SULLIVAN: Yes, your Honor.

13 THE COURT: Show me what that is. Sexually
14 harassing.

15 MR. SULLIVAN: Cahill's second amended
16 complaint, your Honor, page 72.

17 THE COURT: And could you read slowly the
18 allegation that you say Edalat accuses him of --

19 MR. SULLIVAN: Yes.

20 THE COURT: -- sexually harassing Karpinski.

21 MR. SULLIVAN: I'm sorry. It's -- oh, yeah,
22 page 72, paragraph 156, subparagraph (d).

23 THE COURT: Would you read it?

24 MR. SULLIVAN: Stated Cahill was trying to
25 #slutshame Olivia Karpinski and -- these are Edalat --

1 if I back up, 156, specifically, Edalat has made and
2 published the following false written statements about
3 Cahill and Scott on the following dates.

4 And then if we drop down to (d): Stated
5 Cahill was trying to slut-shame Olivia Karpinski and
6 turn his victim into a guilty party after previously
7 posting about Karpinski's false claims of sexual assault
8 against Cahill, which are the subject of the defamation
9 claim against Karpinski below.

10 THE COURT: How does that amount to a -- a
11 report that Edalat was accusing Cahill of sexually
12 harassing Karpinski?

13 MR. SULLIVAN: Cahill states that Edalat had
14 posted false claims of sexual assault against Cahill on
15 previous occasions.

16 THE COURT: Read that to me again. Actually,
17 give me the -- pull the page out of your notebook and
18 let me look at it.

19 Okay. (d) is a report -- is Edalat reporting
20 on a social media forum that stated Cahill was trying to
21 slut-shame Karpinski and turn his victim into a guilty
22 party. That isn't an allegation that Cahill sexually
23 harassed Karpinski --

24 MR. SULLIVAN: It goes on, your Honor. Sorry.

25 THE COURT: You can tell by the tone of my

1 voice I was going to finish the clause, right? Okay.

2 So then there's a parenthetical and then says:
3 After previously reporting about Karpinski's false
4 claims of sexual assault against Cahill -- so this is
5 Cahill posting about Karpinski's false claim of sexual
6 assault.

7 MR. SULLIVAN: No, your Honor. It's Edalat
8 posting. If you go to the top of where 156 begins --

9 THE COURT: Yes, but it talks about Cahill --
10 Edalat posting about Cahill's statement and then says,
11 paren, after previously posing about Karpinski's false
12 claims, that -- what's in the parenthetical is
13 describing what Cahill was saying.

14 MR. SULLIVAN: No, your Honor. I think you're
15 not reading that correctly. This is --

16 THE COURT: I think you're not reading it
17 correctly. And until we get to the Court of Appeals,
18 it's going to be my reading that controls, not yours.

19 MR. SULLIVAN: Understood, your Honor.

20 I will go on to say, however, that even if --
21 and I don't accept the Court's understanding of that
22 phraseology, but even if that is so --

23 THE COURT: So you have -- the way you read
24 this parenthetical, after previously posting about
25 Karpinski's claim -- false claims of sexual harassment,

1 you -- Edalat's posting about Karpinski's false
2 statements of sexual harassment. That's what you think
3 it's saying?

4 MR. SULLIVAN: Yeah. That's what --

5 THE COURT: Edalat is aligned with Karpinski.
6 Edalat's not going to post -- make postings that say
7 Karpinski's making false claims of sexual harassment, is
8 she -- is he?

9 MR. SULLIVAN: This is Cahill talking, saying
10 Edalat is posting about Karpinski's false allegations.
11 Cahill is saying --

12 THE COURT: It's about Cahill. Yeah, it's
13 about Cahill posting.

14 MR. SULLIVAN: No.

15 THE COURT: It's about Edalat posting about
16 Cahill's posting. That's what it is. Because -- you're
17 not -- you're really saying that Edalat was making --
18 filing posts accusing Karpinski of making false
19 statements of sexual harassment?

20 MR. SULLIVAN: No, no.

21 THE COURT: Of course not.

22 MR. SULLIVAN: No. Cahill is saying Edalat is
23 posting the false allegations.

24 Let me say this, your Honor, please. Even if
25 Edalat had never said that Karpinski is alleging this,

1 that's not capable of a defamatory meaning.

2 THE COURT: See, now you're -- I happen to
3 agree with you on that point. I'm trying to establish
4 the preliminary point.

5 The preliminary point, which I think is -- I
6 don't -- I did not find in the pleadings a -- an
7 allegation that Edalat claimed that Karpinski was being
8 sexually harassed by Cahill. I did not find that in the
9 pleadings. There's plenty of pleadings by Karpinski
10 that Cahill was committing sexual harassment. So the --
11 and you have -- for example, Karpinski's cross-complaint
12 alleges, quote, Cahill sexually harassed Karpinski and
13 created a hostile work environment.

14 That's as clear as day that Karpinski was
15 accusing Cahill of sexual harassment in the pleadings.
16 I did not find -- and, frankly, I'm going to -- I'll go
17 back and read this whole document, but to the extent you
18 think this amounts to an allegation by Edalat that
19 Cahill was sexually harassing Karpinski, I say that's
20 not how I read it.

21 But the second point, which we were going to
22 get to after that, is why would that be defamatory
23 against Edalat in any event? You know, just simply that
24 someone makes a complaint that someone else is being
25 sexually harassed is not in any way defamatory.

1 MR. SULLIVAN: It's one of the first things I
2 was going to say today, had I gone in my own ordinary --

3 THE COURT: I know, but we get to do things my
4 way because I spend days and days of thinking about the
5 problem and I need to have a lot of questions answered.
6 When we get done, I'll let you talk for two hours if you
7 want, but I've tried to understand the law and the facts
8 in this case so I spend a lot of time doing that and I
9 want to have answers to my questions. So that's why we
10 do it the way we do it.

11 Okay. So the first part of that is I -- I'm
12 not sure that I agree with counsel's characterization
13 that the underlying pleadings clearly allege that Edalat
14 was accusing Cahill of sexually harassing Karpinski. So
15 I -- I think you may be correct on that point that
16 there's a technical inaccuracy in the -- in that part of
17 the fourth statement. But why does that matter? It's
18 an inconsequential -- it certainly isn't defamatory as
19 to Edalat.

20 MR. WYATT: Your Honor, for a couple reasons.
21 One, with respect to Edalat, it suggests that -- that he
22 is using or trivializing someone's sexual harassment
23 claim.

24 THE COURT: It doesn't say he made a false --
25 he was falsely reporting that Cahill was sexually

1 harassing Karpinski. He just reported that she was --
2 he was.

3 MR. WYATT: As I understand this -- this
4 clause, and it says, Edalat has accused Cahill of
5 sexually harassing Karpinski. It could be read to
6 suggest that he has asserted some kind of claim based on
7 that against Cahill. And in our view, that
8 trivializes --

9 THE COURT: But it doesn't in any way suggest
10 that Edalat's claim is false, it's manufactured, or
11 anything like that. So I don't see how it defames -- if
12 you -- if you saw something happening in the hallway
13 with a lawyer and a woman -- a male lawyer and a woman
14 witness and you thought there was sexual harassment and
15 you complained about it, would that be defamatory?
16 Whether or not it was true, it's not defamatory about
17 you. It doesn't reflect badly on your character. So I
18 don't see how that part of the statement could be
19 consequential for a defamation claim.

20 MR. WYATT: Your Honor, it might -- it would
21 reflect poorly on you if it was understood to mean that
22 you were using that as a bargaining chip.

23 THE COURT: I -- yeah, I don't see how you can
24 read that, though, into the statement or anywhere into
25 the article that that -- that that is so. So I think

1 that's part of the struggle.

2 So let's try to look at the fourth statement.

3 MR. WYATT: Can I say one more thing, your
4 Honor?

5 THE COURT: Yes. Do you want to say one more
6 on the Edalat part of it?

7 MR. WYATT: Well, it's on the Karpinski side
8 of the fence.

9 THE COURT: Well, we're going to talk about --
10 yeah, we're going to talk about that in just a second.

11 Okay. There are two parts to this statement
12 under your theory. One is a claim that Edalat has, that
13 he's being defamed by the fourth statement --

14 MR. WYATT: Correct.

15 THE COURT: -- and the other is a claim that
16 Karpinski is being defamed by what's said about her in
17 the statement, right?

18 MR. WYATT: That's right.

19 THE COURT: Okay. And I want to talk about
20 that second part of it now.

21 And I guess let me ask defendants' counsel.

22 It does appear that technically the pleadings
23 do not reflect that Karpinski ever admitted under oath
24 that her sexual harassment allegations were baseless.
25 There is information that would support an allegation

1 that she admitted under oath that the sexual assault
2 charge she made with the police was baseless. Do you
3 agree that there is nothing in the pleadings that you
4 can point to that is an express statement that she
5 admitted under oath that her sexual harassment
6 allegations were false?

7 MR. SULLIVAN: I do, your Honor.

8 THE COURT: What do you point to?

9 MR. SULLIVAN: I do admit.

10 THE COURT: Oh, you do admit? Okay.

11 So your view, as I understand it, is
12 essentially, Judge, this is fair and accurate because
13 the pleadings clearly allege that she made an allegation
14 of sexual assault that she later acknowledged under oath
15 was baseless. And that allegation is in the -- I
16 believe the second amended complaint exactly that way.

17 And what you're saying is that you need to
18 read this in a commonsense way, the way it would be
19 understood by a layperson, and the distinction between
20 sexual harassment, which is a basis for civil liability,
21 and sexual assault, which is a basis for criminal
22 liability, is not one that the average person would
23 understand and, in any event, it is far worse to make a
24 false allegation of criminal sexual assault than it is
25 of sexual harassment, so if that inaccuracy had been

1 corrected, the -- the allegation would have been far
2 more damaging to Ms. Karpinski than what was actually
3 reported.

4 MR. SULLIVAN: That's correct, your Honor.

5 THE COURT: That would be, I think, your
6 position, wouldn't it?

7 MR. SULLIVAN: That is entirely correct, your
8 Honor, and I think, frankly, that the reporter failed to
9 make that distinction when writing this story.

10 THE COURT: Because that's something lawyers
11 would understand, but not necessarily laypeople.

12 MR. SULLIVAN: Yes, your Honor.

13 THE COURT: Okay. So you understand what his
14 response is to the second part of this? He concedes
15 that the pleadings in the underlying case do not contain
16 a statement that Ms. Karpinski admitted under oath that
17 her sexual harassment claims were baseless. He concedes
18 that. What he says is the pleadings say that she
19 admitted under oath that her sexual assault allegation
20 was baseless. The sexual assault allegation, by the
21 way, is the sexual assault allegation that forms the
22 principal basis for the sexual harassment claim. And
23 she -- according to Cahill's side of the matter, Cahill
24 alleges that she made a -- a sexual assault complaint
25 and then she later admitted under oath that it was

1 not -- that it was baseless. And that's pretty much
2 exactly what the amended complaint says.

3 Now, whether that's accurate or inaccurate is
4 a different matter, but that's what the amended
5 complaint says. What's your response to that?

6 MR. WYATT: Can I ask which paragraph of the
7 second amended complaint --

8 THE COURT: Yeah, I'll get it for you. Let me
9 pull it out. And I'm sorry I might not have it in the
10 second amended complaint. It's Memorandum in Support of
11 Motion to Restrain Unlawful Conduct by Defendants and to
12 Advance the Trial Date in this Action. I think it's in
13 that document.

14 Here's a statement on page -- that's
15 document -- in the underlying case, it's document 94-1
16 and it's on page 9.

17 None of these highly damaging italicized
18 accusations are true. By far, the most damaging
19 accusation, that Mr. Cahill sexually assaulted
20 Karpinski, was actually admitted by her to be false just
21 days ago when Karpinski's deposition was taken on
22 October 14th, 2016. She admitted that the only physical
23 contact she even claims that Karpinski -- that
24 Mr. Cahill had with her, and he denies even that, was
25 supposedly once kissing her on the cheek after she was

1 given a promotion based on sales orders she promised she
2 had obtained, paren, never delivered, and touching her
3 shoulder.

4 And then on the next page: Yet despite having
5 now admitted under oath that nothing like sexual assault
6 ever occurred, Karpinski has posted web pages that
7 proclaim to the world that Mr. Cahill sexually assaulted
8 her and she refused to take down these false statements
9 despite demand that she do so.

10 That seems to be a pretty clear-cut allegation
11 that Ms. Karpinski made a sexual assault claim against
12 Mr. Cahill and later admitted under oath that it was
13 not -- that it was baseless.

14 MR. WYATT: So, your Honor, just to break that
15 down, I would take issue with the way -- I don't think
16 it's fair and accurate the way the statement is written.
17 It definitively says, under oath, she later admitted the
18 allegations were baseless, according to court records.

19 It -- it's saying before you get to the issue
20 of harassment versus assault, that it is a fact that she
21 did recant her statement, which there was no finding --
22 there -- that may have been argued at some level by
23 Mr. Cahill in the preliminary injunction motion, but the
24 way this is written, the way it should have said, if
25 that's their position, is under oath -- well, according

1 to Mr. Cahill's preliminary injunction motion, which was
2 later denied, that was his position.

3 THE COURT: Yeah. He says twice, was later
4 admitted by her to be false just days ago, and yet now
5 having admitted under oath that nothing like sexual
6 assault ever occurred.

7 Isn't that a reasonable take? If he had said
8 in the article the -- the pleadings in the case allege
9 that Ms. Karpinski made a claim of sexual assault but
10 later admitted under oath that nothing like sexual
11 assault ever occurred, that would be basically almost a
12 direct quote of the allegation.

13 MR. WYATT: Your Honor, well, it's not a
14 pleading. It's a preliminary injunction motion.
15 It's --

16 THE COURT: That's a pleading, but it's not --
17 you're saying it's not a complaint or an answer, but
18 motions like that are pleadings. Yeah.

19 MR. WYATT: But it doesn't make clear that
20 it's drawing on that. It says according to court
21 records, as if that was a fact established in the
22 litigation. It -- I think a fair and accurate statement
23 here would have said, but according to Mr. Cahill's
24 preliminary injunction motion, she -- insert his
25 characterization that he used, which the Court later

1 denied.

2 THE COURT: But doesn't the article make clear
3 right up front that this is being based on allegations
4 in a lawsuit that she was disputing?

5 MR. WYATT: I'm not sure it makes that at all
6 clear about this statement, your Honor, that this
7 statement was --

8 THE COURT: Attorney Kashani of Los Angeles
9 represents both Karpinski and Edalat. He says they will
10 prove at trial, which is slated to begin July 25th, that
11 there is no merit to the lawsuit and that Karpinski, who
12 he described as a junior employee, was unfairly dragged
13 into it.

14 I agree it doesn't go point by point and
15 provide their -- her response to each allegation, but
16 there's a general statement in there that alerts the
17 reader that we have two people that are -- two sides
18 that are at war, they're using litigation for their
19 battle, and one side is making these allegations about
20 the other and the other is denying them and a trial will
21 settle the matter. That appears to be what the article
22 is saying.

23 MR. WYATT: Well, your Honor, not -- I would
24 not agree, not with respect to this statement. It's
25 definitively saying she recanted her allegations.

1 THE COURT: According to court records.

2 MR. WYATT: According to court records.

3 THE COURT: Yeah. That's not saying -- okay.
4 I guess you say the word court records means rulings of
5 the court, not filings in the case.

6 MR. WYATT: It does not alert readers that
7 this is an allegation and it does not specify what it's
8 reporting on. As I understand --

9 THE COURT: So if they said according to
10 allegations in court records, you'd be fine with it?

11 MR. WYATT: According to allegations in the
12 motion for preliminary injunction, which was later
13 denied, I view the fair report privilege has to be on
14 official action of the court and the official action was
15 that that motion was denied.

16 THE COURT: Okay. I don't -- I don't
17 understand the privilege at all to be limited in the way
18 that you suggest. So you're saying it only is court
19 orders that can be -- you can only report on court
20 orders?

21 MR. WYATT: Things taken up in an official
22 proceeding, in official actions of the court.

23 THE COURT: We're going to get to the last of
24 your arguments in a second, but let -- anything else you
25 want to say about whether this statement was not a fair

1 and accurate report?

2 MR. WYATT: Your Honor, in the context of the
3 article, other statements are qualified with the word
4 alleged and this one was not.

5 THE COURT: Okay. All right. Anything else
6 you want to say on this subject?

7 MR. WYATT: No, your Honor.

8 THE COURT: No? Anything else the defendants
9 want to say on this subject?

10 MR. SULLIVAN: Yes, your Honor --

11 THE COURT: Go ahead.

12 MR. SULLIVAN: -- very briefly.

13 One of the reasons we believe my clients are
14 entitled to this case being dismissed is because if the
15 plaintiff wants to allege that "according to court
16 records" isn't sufficient, I know the Court has read the
17 deposition transcript, the relevant pages on this
18 particular issue, and I would suggest that if that
19 statement were attributed to the Union Leader solely
20 didn't say "according to court records," I would say
21 that would be an opinion of the defendants', that she
22 admitted her claims were -- that claim was baseless.

23 THE COURT: Yeah, I'm -- the underlying
24 deposition, what it does is it asks her about the
25 elements of the offense of sexual assault and gets her

1 to acknowledge that certain of those elements were not
2 present in the case. That -- that's what I take the
3 deposition to do. But I'm not sure --

4 MR. SULLIVAN: Understood. And that
5 deposition was provided to Patricia Grossmith prior to
6 writing this article.

7 THE COURT: Yeah.

8 MR. SULLIVAN: So if -- if it didn't say
9 according to court records and it just made that
10 statement, I'd say that's a statement of opinion --

11 THE COURT: Yeah.

12 MR. SULLIVAN: -- thus entitled to dismissal.

13 THE COURT: Statements of opinion to the
14 extent they apply knowledge of facts that aren't
15 available to the reader can be defamatory, even if
16 they're statements of opinion.

17 MR. SULLIVAN: Sure.

18 THE COURT: But that's -- I don't -- I'm not
19 focused on that issue. I understand you to make the
20 argument, but I think this is a fair report privilege
21 case. That's what this issue is --

22 MR. SULLIVAN: I agree, your Honor.

23 THE COURT: -- what this case is about.

24 Okay. Let's then turn to your last point
25 which you want to make an argument about, official

1 proceeding, right, that somehow this was not an
2 official -- that this had not matured to the point that
3 there had been judicial action and without judicial
4 action, there can't -- there's no entitlement to the
5 privilege. Is that the argument that you're making?

6 MR. WYATT: Yes, your Honor, based on comment
7 (e), Restatement 611, Restatement (Second) of Torts.

8 THE COURT: Yes. I'm well aware of comment
9 (e). Can you tell me, has the New Hampshire Supreme
10 Court ever adopted comment (e)?

11 MR. WYATT: It has not specifically addressed
12 it, your Honor. The closest it has come is in the
13 *Thomas* case. It adopts a related doctrine and
14 essentially held that you can't claim fair report
15 privilege simply because there's a record in the police
16 department. It has to be an official action of the
17 police department that's being reported upon. And --

18 THE COURT: Okay. That's not how I read
19 *Thomas*. We went over -- but isn't that the same quote
20 you just -- we talked about earlier that you're relying
21 on?

22 MR. WYATT: In that same section.

23 THE COURT: Yeah. I just don't rely -- read
24 *Thomas* in that way. It doesn't require -- it doesn't
25 require that what is being reported on is an action of

1 the government official. That's never how the fair
2 report privilege -- the fair report privilege has never
3 been so limited and certainly (e) does not limit the
4 fair report privilege in that way.

5 What the privilege -- what the Restatement
6 states is: A report of a judicial proceeding implies
7 that some official action has been taken by the officer
8 or body whose proceedings are thus reported. The
9 publication, therefore, of the contents of preliminary
10 proceedings such as a complaint or petition before any
11 judicial action has taken -- been taken is not within
12 the rule stated in this section. Therefore, report of
13 preliminary pleadings such as complaint or petition
14 after any judicial action has been taken is within the
15 rule.

16 Do you see what I -- you seem to be misreading
17 this section to apply the rule to a limited -- very
18 limited class of things, only what the judge says, not
19 what anybody else says, in the underlying case. And if
20 the drafters of the Restatement had intended the rule to
21 work that way, they would have stated it and courts
22 would have applied it that way, but they never do.
23 They're certainly not -- the New Hampshire Supreme Court
24 has never adopted this -- this rule and in *Thomas*
25 doesn't apply it in the way you're suggesting.

1 What I was looking at is has there been
2 judicial action in the case. Because what -- as I
3 understand the purpose of the exception, it's designed
4 to prevent somebody from being freed from the effects of
5 a defamation action by filing a phony complaint. Like I
6 could file a phony complaint saying horrible things
7 about you and before anything could happen, I could call
8 the reporter and say, you ought to see the complaint
9 that I just filed; you might be interested in it. And
10 then the reporter could report on the defamatory things
11 and claim fair report privilege and I could accomplish
12 the -- a defamation without subjecting myself to
13 liability.

14 Where there's judicial action, for example,
15 if counsel for the Union Leader were to make
16 outrageously defamatory things about you in a pleading
17 and you can't -- you could move to strike them, those
18 allegations, from the record. And people do file
19 motions to strike allegations in a complaint that are
20 extraneous and scurrilous kind of allegations.

21 But this case was very far advanced. It was
22 getting close to trial at the time this article
23 appeared. I mean, if you look at the docket sheet in
24 the case, at the time the article was published, there
25 had been more than 200 docket entries in the case.

1 There had been many orders issued on the case. There'd
2 been an order issued on the second amended complaint by
3 that time.

4 So there -- there had been ample judicial
5 action in the case. I don't see how, even if the
6 exception applies, how it could possibly apply here.
7 What's your response?

8 MR. WYATT: I guess I understand -- my
9 understanding, your Honor, is official action was more
10 in terms of some official proceeding, something along
11 the lines of maybe the preliminary injunction
12 proceeding, maybe trial, when witnesses are giving
13 testimony on the subjects that are alluded to in the
14 complaints.

15 THE COURT: Well, it says generally some
16 official action has been taken by the officer or body
17 whose proceedings are thus reported.

18 With respect to a judicial proceeding, it --
19 it doesn't require that there be a trial. It says
20 below: It is not necessary, however, that final
21 disposition be made of the matter in question. It is
22 enough that some judicial action has been taken so that
23 in the normal progress of the proceedings, a final
24 decision will be rendered.

25 That's sort of to prevent like summary

1 dismissal. So one way in which if you file a *pro se*
2 complaint in this court and ask for relief from filing
3 fees, before anybody has to respond to it, the Court
4 will review it and if it's frivolous will just throw it
5 out. So it's designed to deal with those kinds of
6 pleadings. It doesn't require a trial. And there have
7 been many, many pleadings filed in this case prior to
8 the publication of this article and many judicial
9 actions taken on those pleadings. So I -- I really
10 don't see how that -- that applies.

11 Anything else you'd like to add on that?

12 MR. WYATT: No, your Honor.

13 THE COURT: All right. What would you like to
14 say about the official proceeding?

15 I also should note that there -- the modern
16 trend is not to enforce this exception at all. It's
17 unclear to me whether New Hampshire would enforce it.
18 If I were to allow the case to go to trial, we might end
19 up having to certify this question to the New Hampshire
20 Supreme Court because both -- I know Illinois and
21 New Jersey have flatly rejected the exception and said
22 it does not apply in fair report cases.

23 So -- but the -- I think the larger problem we
24 have is that there had been ample judicial action on
25 this matter prior to the publication of the article and

1 ample judicial action following all of the statements
2 that were the basis for the reporting in the article.

3 So what else did you want to add?

4 MR. SULLIVAN: I don't want to -- I completely
5 agree with the Court's assessment. I have already cited
6 the November 29, 2016, order which counsel a moment ago
7 I think said if -- I'd agree if it was in the context of
8 a preliminary injunction, which is what we have here.
9 And if counsel were writing the article, he'd say and
10 the preliminary injunction was denied, and then, of
11 course, we'd have to add because Cahill was seeking
12 prior restraint of free speech and that's why the
13 injunction was denied. But we don't have to discuss
14 every aspect of every motion, nor could we ever in this
15 particular case.

16 I conclude, your Honor, by saying what we have
17 here is a fair and accurate report on a matter of public
18 interest where -- and I did want to say, going back to
19 the issues of malice and we haven't got to conspiracy
20 and consumer protection -- I allege that they all fall
21 because the fair report privilege applies.

22 THE COURT: Okay. So let's -- let's deal with
23 that question or part of that question first.

24 Do you both agree that if the fair report
25 privilege applies here to the defamation claim, it also

1 applies in the same way to the false light claim?

2 You think that.

3 Do you agree or not?

4 MR. WYATT: Your Honor, I -- and I did cite --
5 there's a section in the Restatement that says those
6 doctrines apply to false light the same as they do to
7 defamation.

8 THE COURT: Okay. So I think -- and I don't
9 see any reason why in this case -- there might be some
10 cases where some versions of false light might not be
11 subject to the same fair report privilege, but I don't
12 see any basis in this case for recognizing some special
13 exception.

14 So to the extent that fair report bars the
15 defamation claim, it also bars the false light claim.
16 The conspiracy is based on conspiracy to commit
17 defamation and false light towards. If the defamation
18 and false light claims fail, the conspiracy claim fails
19 for the same reason. That seems a matter of just basic
20 logic. If somebody disagrees with that, tell me.

21 We can -- we can talk about the conspiracy
22 claim -- I assume it'd be the Consumer Protection Act
23 claim -- in a moment, but I want to first ask you, do --
24 anything any of you want to say on the defamation and
25 false light claims, now is the time to say it.

1 I've read your pleadings. I understand your
2 other arguments. I see this primarily as a fair report
3 case and whether the fair report privilege applies.
4 You've raised an argument that -- that I didn't
5 understand in reading the pleadings, so I'm going to
6 think carefully about that.

7 You've also made an argument on malice, where
8 I'll have to look at the sufficiency of the pleadings on
9 that. And of the four statements that comprise your
10 claim, it seems to me you have almost no argument with
11 respect to the first three. With respect to the fourth,
12 there are some things about it that are not completely
13 accurate. Whether those things can support a claim
14 notwithstanding the fair report privilege I'm going to
15 take under advisement and think about.

16 But anything else you want to say about your
17 defamation or false light claims? I'll hear you first
18 and then you. Okay?

19 MR. WYATT: Your Honor, I know you've read
20 everything submitted. I just want to spotlight one
21 thing and that is the surreply, the finding of -- or the
22 wording of the California court discussing the issue of
23 what we've called today the fourth statement, the one
24 that she recanted.

25 And this was in the context of the court

1 considering Denterlein's Anti-SLAPP motion and denying
2 that motion and observing --

3 I'm going to interrupt you right there. That
4 is provably true or false, meaning that she testified
5 under oath that her allegations were baseless.

6 This is what attorney for the Union Leader
7 characterized an opinion.

8 That is provably true or false, and in this
9 case the evidence is that that statement is false. I
10 know Karpinski, dash, I'm reading this declaration here.
11 It was my opinion based on my reading of Karpinski's
12 deposition that she admitted that under oath. I don't
13 know how any human with limited knowledge of the English
14 language could make that statement.

15 THE COURT: What statement?

16 MR. WYATT: The statement that she had
17 admitted under oath that her allegations were baseless.

18 THE COURT: What allegation?

19 MR. WYATT: Well, they didn't get into
20 whether --

21 THE COURT: Is it sexual assault or sexual
22 harassment? I don't know what was before the judge in
23 that case, but the deposition excerpt that I've been
24 provided arguably supports a conclusion that she was
25 acknowledging that certain elements that are required

1 for proof of sexual assault were not present in the case
2 that she cited as the basis for her sexual assault
3 complaint.

4 As to sexual harassment, she did not expressly
5 deny that the elements of sexual harassment were proved
6 in her case. In fact, she continued to maintain
7 throughout that she had been sexually harassed and she
8 recovered a small verdict that was for all -- a general
9 verdict for all of her claims which could,
10 theoretically, be for sexual harassment, might not be,
11 because there were other claims. The jury was never
12 asked to specify what the basis for the claim was, but I
13 don't see her as ever withdrawing her sexual harassment
14 claim. But I did see in her deposition that she
15 appeared in responding to certain questions to deny that
16 there was certain conduct that was necessary to satisfy
17 one or more of the elements of sexual assault.

18 MR. WYATT: As I'm reading this transcript,
19 your Honor, in the preceding paragraph they're talking
20 about sexual harassment.

21 THE COURT: That -- what the judge was talking
22 about?

23 MR. WYATT: Presumably, given the argument
24 presented to him.

25 THE COURT: Yeah, and that makes -- I agree.

1 To the extent somebody was saying sexual harassment, she
2 admitted under oath was false, the pleadings didn't
3 allege that, and the -- her deposition doesn't expressly
4 address on the point that I've read whether the sexual
5 harassment claim is viable or not and, in fact, she
6 continued to maintain the viability of the sexual
7 harassment claim notwithstanding her deposition.

8 But the challenge for you is this. What you
9 really want them to report is she made a -- that the --
10 correctly report what's in the article, which is what's
11 in the article is she complained to the police that she
12 had been sexually assaulted and later admitted under
13 oath that that charge was baseless.

14 Which is more defamatory of a person, that
15 they made a false claim of sexual harassment or a false
16 claim of sexual assault? It's quite obvious exposing
17 somebody to criminal penalties for sexual assault based
18 on a baseless allegation, if anything, is more damaging
19 than making the -- a baseless allegation about sexual
20 harassment.

21 So it's hard for me to see how that mistake in
22 any way was problematic for your client. If anything,
23 it was a mistake that made her seem better than what the
24 pleadings actually reported.

25 So, in any event, did you want to say anything

1 else about this particular subject?

2 MR. WYATT: No, your Honor.

3 THE COURT: Okay. Did you want to say
4 anything else?

5 MR. SULLIVAN: One last thing on the false
6 light invasion of privacy, your Honor.

7 I agree that the fair report privilege would
8 take it out, but the last point I'd make on it is back
9 up to the word privacy.

10 This is not an invasion of Ms. Karpinski's
11 privacy. She's posting to 14,000 readers on her
12 Instagram site and others and hiring a PR firm. She's
13 generating publicity regarding these affairs. So it's
14 not a -- it's not an invasion of privacy by any stretch
15 of the imagination.

16 That's it, your Honor.

17 THE COURT: Okay. I wanted to go over the
18 Consumer Protection Act count.

19 Let me ask my reporter -- would you like to
20 take a short break and we'll finish with that or would
21 you like to go another 15 minutes? You think you can do
22 that? Okay.

23 So you have a claim for what you call
24 respondeat superior. That's just a -- a way of saying
25 that it's not a distinct cause of action; it's just

1 saying that they are -- the Union Leader is vicariously
2 liable for the torts of its employees. That's -- isn't
3 that what you're saying with that claim?

4 MR. WYATT: That's correct, your Honor.

5 THE COURT: So it's not a distinct claim.

6 So we've got a -- we've got a defamation
7 claim, a false light claim, a conspiracy claim. Do you
8 agree with me that if your first two claims fail, your
9 conspiracy claim also fails?

10 MR. WYATT: Well, your Honor, there is a
11 section of the Restatement saying that you cannot have,
12 quote, elusive arrangement where one person says
13 something in a pleading for the purposes of allowing it
14 to be republished with impunity to the rest of the
15 world.

16 I would say that notwithstanding our
17 discussion here today, it still could be the case. As
18 we've alleged, I think that Cahill certainly had that in
19 his -- that was his intent in alleging these and the
20 notion that the Union Leader went along with it could,
21 in and of itself, defeat the fair report privilege.

22 THE COURT: So your argument is even if the
23 claims fail as to the Union Leader, the under -- first
24 two claims fail, if somebody else committed -- but the
25 defamation and false light act that you're citing is the

1 publication in the Union Leader, right? That's the --

2 MR. WYATT: That's right.

3 THE COURT: Okay. And if that publication is
4 not actionable defamation or false light -- false light
5 tort and that they conspired to do that which is not
6 actionable is not going to give rise to a claim. There
7 might be unusual circumstances, where like I can
8 conspire with you to make a -- for you to make a
9 defamatory statement. I haven't made a defamatory
10 statement, so I'm not liable for defamation. If someone
11 sues me for your defamatory statement, for defamation, I
12 can have the claim dismissed, but I can still be liable
13 for conspiring with you for your defamatory statement.
14 But that's not what your conspiracy claim is about in
15 this case. So I just don't see how it can survive if
16 the first two don't survive.

17 Let's deal, finally, with the Consumer
18 Protection Act claim, which is the only other claim.
19 And I have a little bit of trouble understanding the
20 defendants' argument on Consumer Protection, so will you
21 explain it to me? Why do you think the Consumer
22 Protection Act claim must be dismissed?

23 MR. SULLIVAN: Well, the statute itself
24 protects publishers, broadcasters, printers, and other
25 persons engaged in the dissemination of information --

1 who publish, broadcast, or reproduce material without
2 knowledge of the deceptive character are exempt from the
3 provisions.

4 THE COURT: Well, I understand that.
5 Exemptions are usually the burden of proof is on you to
6 prove the exemption. And at a 12(b)(6) stage, I have
7 trouble seeing how I can grant dismissal based on an
8 affirmative defense where you bear the burden of proof
9 with respect to whether you knew or didn't know of the
10 falsity of the underlying statement.

11 MR. SULLIVAN: Well, before you get there, I
12 think you have to look at the allegations in the
13 complaint. And, again, conclusory allegations will not
14 survive a motion to dismiss. I think we have that with
15 respect to the conspiracy.

16 THE COURT: But you're saying, though, the
17 complaint -- the Consumer Protection Act claim should be
18 dismissed because the exemption for publication that is
19 not knowingly false applies, right? In order for that
20 exemption to apply, that -- it has to -- you have to
21 have not acted with knowing falsity.

22 MR. SULLIVAN: There's no allegation in the
23 complaint that Union Leader knew these allegations to be
24 false prior to publication.

25 THE COURT: Right. But when you sue someone

1 in a complaint and the defense is the claim is barred by
2 the statute of limitations, it's not the plaintiffs'
3 obligation to plead that the claim is not barred by the
4 statute of limitations. It's an affirmative defense.

5 There are some times you can grant a 12(b)
6 motion with respect to an affirmative defense. For
7 example -- for example, in this case, the fair report
8 privilege is an affirmative defense. But, here, the --
9 the element that bears on the exemption is whether your
10 actions were knowingly false and whether -- now, I'm not
11 sure that they have to plead that the exemption doesn't
12 apply because the exemption is an affirmative defense.
13 So they just have to plead the consumer protection
14 violation, you have to plead the affirmative defense,
15 and the only way you can win on summary judgment -- on
16 12(b)(6) is if it's undisputed that the facts that
17 support your affirmative defense are true.

18 MR. SULLIVAN: I believe, your Honor, that in
19 looking at the complaint, it's not enough to survive a
20 motion to dismiss if there are only conclusory
21 allegations without any factual allegations supporting
22 the conclusion.

23 THE COURT: Yeah, but you're just talking past
24 me. I -- what I've said to you is you are relying on an
25 exemption. Are you relying on an exemption to the --

1 are you relying on an exemption to the Consumer
2 Protection Act?

3 MR. SULLIVAN: I don't think we have to, no.
4 I don't think they've alleged --

5 THE COURT: So the thing you just cited to me
6 doesn't bear on the reason why the Consumer Protection
7 Act claim should be dismissed. You started out your
8 argument by citing an exemption to the Consumer
9 Protection Act. If you're not relying on that, that's
10 fine. Are you telling me you're not relying on that
11 exemption?

12 MR. SULLIVAN: Well, as much as we relied on
13 the affirmative defense of the fair report privilege, we
14 would rely on that affirmative defense. But in -- but
15 in doing so, saying --

16 THE COURT: Okay. Let's use your -- let's use
17 fair report as an example.

18 The plaintiffs' complaint does not have to
19 allege that there was a defamatory statement and the
20 statement was not subject to the fair report privilege.
21 They don't have to allege that.

22 MR. SULLIVAN: No, but they have to allege
23 there was a defamatory statement.

24 THE COURT: Right. And they have alleged that
25 there was a false statement that gives support -- the

1 same four false -- same four statements that they say
2 are false are -- are cited by them to support their
3 Consumer Protection Act claim.

4 MR. SULLIVAN: That's not what the Consumer
5 Protection Act was enacted to protect consumers from.
6 That's why -- not relying on it as affirmative defense,
7 but that's why publishers have that commonsense defense.

8 THE COURT: Okay. So are you -- are you
9 saying that your 12(b)(6) argument with respect to the
10 Consumer Protection Act is they have failed to
11 sufficiently allege that any of the four statements are
12 unfair and deceptive statements that can support a claim
13 under the Consumer Protection Act?

14 MR. SULLIVAN: Yes, your Honor.

15 THE COURT: Okay. That's a different argument
16 from the one I understood you to be making in your
17 memorandum, so now that I understand that, I will look
18 at it.

19 So saying -- but is saying that they are -- I
20 guess you would say whether something is unfair and
21 deceptive, if it is fair reporting because it's fair and
22 accurate, the same evidence -- the same documents that
23 lead to the conclusion that those statements are fair
24 and accurate supports a conclusion that they were not
25 unfair and deceptive. And so on these --

1 MR. SULLIVAN: Yes.

2 THE COURT: -- this complaint and the
3 attachments to it do not, in your view, allege unfair or
4 deceptive statements because the very documents that
5 they -- they reference and include in their complaint
6 demonstrate that those statements do -- do not unfairly
7 and deceptively report what's in the complaint -- in the
8 pleading.

9 MR. SULLIVAN: That's correct, your Honor.

10 THE COURT: Okay. I -- I understand that now.
11 All right. What do you want to say in
12 response to that?

13 MR. WYATT: Your Honor, I would say -- first,
14 I acknowledge there are cases in Massachusetts I'm aware
15 of at least that say where your CPA claim is a
16 derivative of a defamation claim and the defamation
17 claim fails, so, too, does the CPA claim in a sense.
18 I'm not aware of anyone applying defamation privileges
19 to a CPA claim and what we have briefed, in essence, is
20 that we think the CPA provides defenses such as the
21 exemption and does not provide for a fair reporting
22 privilege. And the fair reporting privilege there --

23 THE COURT: But the statement does have to be
24 unfair and deceptive, right, to be a Consumer Protection
25 Act violation?

1 MR. WYATT: (Nods head.)

2 THE COURT: So if the statement is a fair and
3 accurate report of what's in an official filing, how can
4 it be unfair and deceptive?

5 MR. WYATT: Well, your Honor, I guess that's
6 where we diverge because we believe, and particularly
7 with the statement about her recanting her testimony,
8 that it was not fair and accurate and, therefore, it was
9 unfair and/or deceptive.

10 THE COURT: Yeah. I think if it's -- while
11 I -- while I understand your -- your point that the
12 New Hampshire Legislature has not necessarily imported
13 all of the privileges that exist to defamation into
14 their Consumer Protection Act, I get that point, that
15 argument, a statement that is fair and accurate, a fair
16 and accurate description of what's in a pleading, it's
17 hard to see how that statement, which is a fair and
18 accurate report of what's in a pleading, can be unfair
19 and deceptive to support a Consumer Protection Act
20 claim. And it -- unfair and deceptive might mean
21 something different, but I'm not sure it means something
22 sufficiently different to support a claim where the
23 underlying core claim of defamation fails because the
24 reporting is fair and accurate.

25 So, for example, if they had just quoted

1 the -- the allegations in the complaint -- in the
2 complaint here and said, in a second amended complaint
3 filed on this date, they said that, even if what those
4 things are said in the complaint are, in fact, untrue,
5 I'm not sure that that reporting would support a
6 Consumer Protection Act claim because it is accurately
7 reporting what's in the lawsuit allegation.

8 But I'll take that under advisement.

9 Is there -- is there anything else either you
10 want to say on the Consumer Protection Act claim?

11 MR. WYATT: Just one thing is I believe the
12 exemption we were talking about, the knowledge, in
13 essence, of the media defendant in the CPA, I believe
14 sheds light on the question of maybe the dividing line
15 between what's unfair or deceptive and what's exempt.
16 And I would say their safe harbor is that they need to
17 prove that they did not have knowledge of it. So if
18 they were reporting in an unfair or deceptive way, that
19 is their defense.

20 THE COURT: Yeah. That's an affirmative
21 defense and as I was originally thinking, as I was
22 originally understanding the defendants' argument, I was
23 wondering how I could reach any conclusions at the
24 12(b)(6) stage about whether the defendant knew about it
25 or not. And since it's an affirmative defense, you

1 don't have to plead that the exemption doesn't apply
2 like you -- you do with respect to malice. You would
3 have to plead malice -- if there's a fair report
4 privilege and you're saying it doesn't apply because of
5 malice, the burden would be on you to prove malice for
6 the defamation claim.

7 So I think I could reach a conclusion about
8 whether the complaint sufficiently pleads malice. I was
9 less -- it was less clear to me that I could reach a
10 conclusion about whether you've sufficiently pled that
11 the Union Leader did not know of or knew of the falsity
12 of the claim.

13 But as I now understand the defendants'
14 arguments, a slightly different argument is that you --
15 the four statements you allege were not unfair and
16 deceptive and you haven't sufficiently pleaded that they
17 are unfair and deceptive regardless of whether the
18 exemption applies and you do have to plead unfair and
19 deceptive acts or statements, I think, to support a
20 Consumer Protection Act claim.

21 Okay. Anything else anyone wants to say on
22 any subject?

23 MR. WYATT: For what it's worth, I don't
24 think -- that argument hasn't been briefed by the
25 defendants. As I am looking at page 13 of their

1 memorandum of law, it simply says because it's not
2 defamation, it's not Consumer Protection Act. It does
3 not say it is not unfair and deceptive because the fair
4 report privilege applies. But --

5 THE COURT: Do you want to -- I'm not going to
6 deny -- like I won't deny you the ability to interject
7 what I think is a fourth argument as to why the fair
8 report privilege doesn't apply, I'm not going to deny
9 them an opportunity to argue that the statements are not
10 unfair and deceptive. Do you feel some need to file a
11 further reply brief on that issue?

12 MR. WYATT: No, your Honor, just I would say
13 for the record we don't agree with that new argument.

14 THE COURT: Okay. That's -- that's fair. I
15 understand.

16 All right. Anything else? Did you want to
17 add anything else?

18 MR. SULLIVAN: I want to thank the Court for
19 the obvious effort that you put into this case in
20 advance of this hearing.

21 THE COURT: Hey, we take this -- I take this
22 stuff very seriously. Defamation claims are significant
23 claims that require careful analysis and we're going to
24 continue to work on them. So I want to be clear that
25 there are several issues that I'm going to continue to

1 examine.

2 When I take a position in an oral argument,
3 sometimes I'm trying to just see if I can falsify the
4 very position that I'm advocating, so you shouldn't
5 necessarily draw any conclusions about this argument.

6 I -- I want to very carefully look at this
7 fourth argument that you have raised based on *Bufalino*
8 that I had not previously considered. I'm going to look
9 carefully at the malice argument that I -- that has been
10 presented here and whether you have sufficiently
11 identified pleadings that would support an allegation of
12 malice. I'm going to look at the fourth statement and
13 whether that is fair and accurate and I'm going to look
14 at the Consumer Protection Act count. I'm going to look
15 at all of those things and it's going to take me some
16 time. We're going to write -- we'll write a decision
17 that will analyze it, but -- so don't draw any
18 conclusions about what I'm likely to do here.

19 MR. SULLIVAN: May it please the Court, I
20 apologize. I did want to follow up on the *Bufalino* --

21 THE COURT: Okay.

22 MR. SULLIVAN: -- issue.

23 THE COURT: Yeah.

24 MR. SULLIVAN: If the Court looks at the
25 information provided by Denterlein, the quotes in the

1 article are quotes from the pleadings. So if they
2 weren't provided by Denterlein, obviously --

3 THE COURT: It's amazing to me how close they
4 reflect things in the actual pleadings.

5 MR. SULLIVAN: I want to suggest that in
6 addition to Patricia Grossmith, there were other
7 reporters and correspondents involved in this case.
8 There's an editor who's no longer there. Grossmith is
9 no longer there. But I do know that at the Union Leader
10 newsroom, they access PACER on a daily basis --

11 THE COURT: Yeah, I --

12 MR. SULLIVAN: -- so it's --

13 THE COURT: -- probably couldn't consider that
14 at the 12(b) stage, but --

15 MR. SULLIVAN: I think it's a reasonable
16 inference I'd ask the Court to draw, that obviously they
17 had to have somehow obtained the pleadings in order to
18 quote them.

19 THE COURT: Well, I think the -- to this
20 extent, I think I agree with you that I can consider the
21 pleadings themselves at the 12(b) stage. The case law
22 does allow me to consider that.

23 To the extent that a statement in the pleading
24 very closely corresponds to a statement in the article,
25 it is hard to then think that the reporter reported

1 without either directly or indirectly relying on the
2 pleading, especially where the article states that it's
3 according to the pleadings.

4 MR. SULLIVAN: And uses quotation marks.

5 THE COURT: And so I -- I think the -- I'm not
6 inclined to accept what I think is the plaintiffs'
7 primary argument, which is unless they look at the
8 pleadings themselves, they can't claim fair report. And
9 I don't think any of the cases they've cited go that far
10 and I think it would be quite problematic to create a
11 new exception to the privilege that the New Hampshire
12 Supreme Court has not recognized along those lines. And
13 I don't think *Bufalino* even would support that broad an
14 extension of this new exception to the fair report
15 privilege.

16 So I think close correspondence between a
17 statement in the pleading and a statement in the report
18 is something that needs to be considered and can be
19 considered at the 12(b)(6) stage. Whether you looked at
20 PACER and -- that would come up at summary judgment. If
21 you did that, I would assume somebody was assigned to go
22 online and look at the filings and maybe can testify to
23 that. But I can't consider that at this stage of the
24 proceeding. Okay? Anything else?

25 All right. Thank you. I mean, it's a very

1 interesting issue. We obviously take it seriously on
2 both sides. And I'll -- I'll be issuing a written
3 decision on this. It may take us a month or so, but
4 we'll try to get it out as soon as we can. All right?
5 Thank you.

6 MR. JOHNSON: Thank you, your Honor.

7 MR. SULLIVAN: Thank you, your Honor.

8 (Proceedings concluded at 4:22 p.m.)
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that
the foregoing transcript is a true and accurate
transcription of the within proceedings, to the best of
my knowledge, skill, ability and belief.

Submitted: 10/3/19

Liza W. Dubois
Liza Dubois, RMR, CRR
Licensed Court Reporter No. 104
State of New Hampshire